UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ORLANDO FUENTES and INTERNATIONAL BROTHERHOOD OF CORRECTIONAL OFFICERS, LOCAL No. 248, Plaintiffs	)	
v.	)	CIVIL ACTION NO. 02-30173-MAP
HAMPDEN COUNTY SHERIFF'S DEPARTMENT, MICHAEL ASHE, AS SHERIFF, AND DIANE JIMINEZ, Defendants	)	

MEMORANDUM AND ORDER REGARDING
REPORT AND RECOMMENDATION ON
DEFENDANTS' MOTION TO DISMISS
(Docket No. 4)

June 25, 2004

PONSOR, U.S.D.J.

I. INTRODUCTION

Orlando Fuentes ("Fuentes") and the International Brotherhood of Correctional Officers, Local 248 (the "Union") (together, the "plaintiffs"), have brought an eleven-count complaint against the Hampden County Sheriff's Department (the "Sheriff's Department"), Michael Ashe ("Ashe"), in his official capacity as Sheriff, and Diane Jiminez[1] ("Jiminez"), (collectively, the "defendants").

Fuentes claims that Jiminez intentionally inflicted emotional distress on him (Count I) and interfered with his contractual relations (Count II). Fuentes further claims that Jiminez and the Sheriff's Department defamed him (Count III) and

[1] The pleadings do not state whether Jiminez is sued individually or in her official capacity.

violated his right to privacy (Count IV. He also alleges that the Sheriff's Department violated his First and Fourteenth Amendment rights (Count V) and breached his employment contract (Count XI). Further, Fuentes claims that all three defendants violated his rights under the Massachusetts Civil Rights Act (the "MCRA"), Mass. Gen. Laws ch. 12, § 111 (Count VI), violated his rights pursuant to 42 U.S.C. § 1983 (Count VII), and violated his rights under the Massachusetts Whistleblower Act, Mass. Gen. Laws ch. 149, § 185 (Count VIII). The Union similarly complains that the Sheriff's Department violated its First Amendment rights (Count IX) and engaged in a civil conspiracy (Count X).

The defendants filed a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), arguing that the court lacks jurisdiction over the subject matter of the plaintiffs' complaint and that the complaint fails to state claims upon which relief may be granted. The defendants' motion was referred to Magistrate Judge Kenneth P. Neiman (the "Magistrate Judge"), who issued a Report and Recommendation to the effect that the motion should be allowed, in part. Specifically, the Magistrate Judge recommended dismissing the contractual interference claim (Count II) and the breach of contract claim (Count XI) based upon the court's lack of subject matter jurisdiction.[2] Likewise, the

[2] The Magistrate Judge alternatively recommended that the breach of contract claim be dismissed for failure to state a claim. However, because the court agrees with the Magistrate Judge's analysis and finds that subject matter jurisdiction is lacking as to Count II and Count XI, the claims are dismissed on that ground. The court agrees that the jurisdictional arguments do not justify dismissal of the remaining claims. As mentioned infra, the

Magistrate Judge recommended dismissing the intentional infliction of emotional distress claim (Count I) and the MCRA claim (Count VI). Furthermore, the Magistrate Judge recommended dismissing the defamation claim (Count III) and the privacy claim (Count IV) against both Ashe and the Sheriff's Department, and also dismissing the Whistleblower Act claim (Count VIII) against Jiminez and Ashe. As to the remainder of the claims, he recommended that dismissal be denied. See Report and Recommendation, Exhibit A (attached).

The defendants thereafter filed objections to the Report and Recommendation, alleging that the Magistrate Judge erred in failing to recommend dismissal of all the plaintiffs' claims. The plaintiffs have opposed the defendants' objections, but do not themselves separately object to the Magistrate Judge's recommendation of dismissal of the counts listed in the preceding paragraph.

The defendants' objections require this court to weigh the Motion to Dismiss de novo.

Based on this review, the court will adopt the Magistrate Judge's recommendation to dismiss certain counts of the complaint and will in addition dismiss the balance of the counts alleging violation of the Privacy Act (Count IV) and violation of the Whistleblower Act (Count VIII).

II. STANDARD OF REVIEW

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plaintiffs have not objected to the Report and Recommendation, and therefore the court will only revisit those recommendations of the Magistrate Judge that were objected to by the defendants.

Fed. R. Civ. P. 12(b)(1) empowers a party to seek dismissal of a claim when there is a "lack of jurisdiction over the subject matter" of that claim. Dismissal under Fed. R. Civ. P. 12(b)(6) is proper when it appears beyond a doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. See Berner v. Delahanty, 129 F.3d 20, 25 (1st Cir. 1997). Both rules require the court to construe the allegations of the complaint in the light most favorable to the non-moving party, here the plaintiff. See Negron-Gaztambide v. Hernandes-Torres, 35 F.3d 25, 27 (1st Cir. 1994).

III. FACTUAL AND PROCEDURAL BACKGROUND

The factual background and prior proceedings are clearly laid out in the Report and Recommendation, page pages 2-6, and need not be repeated here as there has been no objection by either party concerning the facts relied upon by the Magistrate Judge.

IV. DISCUSSION

A. Defamation Claim (Fuentes against Jiminez)(Count III).

The defendants object to the recommendation that the defamation claim be dismissed against the Sheriff's Department, but left to proceed against Jiminez. In Massachusetts, defamation is "the intentional or reckless publication, without privilege to do so, of a false statement of fact which causes damage to the plaintiff's reputation." Elicer v. Toys "R" Us, Inc., 130 F. Supp. 2d 307, 310 (D. Mass. 2001) (citing Correllas v. Viveiros, 572 N.E.2d 7, 10 (Mass. 1991). Typically, the

statement must "discredit the plaintiff in the minds of any considerable and respectable segment of the community." Draghetti v. Chimelewski, 626 N.E.2d 862, 866 (Mass. 1994) (citations and internal quotation marks omitted). "There is no requirement . . . 'that the defamatory matter be communicated to a large or even substantial group of persons. It is enough that it is communicated to a single individual other than the one defamed.'" Brauer v. Globe Newspaper Co., 217 N.E.2d 736, 739 (Mass. 1966)(quoting Restatement of Torts § 577; further citations omitted).

An employer enjoys a "conditional privilege" to communicate information about its employees that might ordinarily be considered defamatory if the communication is "reasonably necessary to serve [the employer]'s legitimate interest in the fitness of [the employee] to perform his . . .job." Foley v. Polaroid Corp., 508 N.E.2d 72, 79 (Mass. 1987)(citation and internal quotation marks omitted). This privilege is extended to include "a narrow group of individuals who share a common interest in the communication." Masso v. United Parcel Service of America, 884 F. Supp. 610, 622 (D. Mass. 1995). Nonetheless, such a privilege is lost if the employer acts recklessly in publishing the information. See Bratt v. Int'l Bus. Mach. Corp., 467 N.E.2d 126, 131-33 (Mass. 1984).

Here, the allegedly defamatory statements in question, as argued by both sides, are set forth in the following excerpts from the suspension letter of August 16, 2002:

> You acted with the intent of damaging the primary Captain's reputation or with gross and inconceivable disregard for the obvious effect your "investigation" would have on his reputation and respect . . . . Based upon . . . your lack of candor during the investigation, you conducting union or personally motivated business on work time without permission, and engaging in conduct under the guise of an investigation that was reckless and damaging to the reputation of a supervisor, I am issuing a five (5) day suspension without pay . . . .

At this early stage of the case, it cannot be said that these statements offer no possible basis for a claim of defamation. The letter's contents do not appear to be statements of opinion and it might be argued that no privilege existed to protect them because they were recklessly made and published to various individuals both within and outside the Sheriff's Department. While statements of opinion are generally not actionable as defamation, such statements may be actionable if they imply that undisclosed defamatory facts are the basis for the opinion. See Nat'l Assoc. of Gov't Employees, Inc. v. Cent. Broad Corp., 396 N.E.2d 996, 1000 (Mass. 1979), cert. denied, 446 U.S. 935 (1980).

Under these circumstances, it would be premature to dismiss the defamation claim against Jiminez. The issue may be revisited at the close of discovery upon a motion for summary judgment.

B. Privacy Claim (Fuentes against Jiminez) (Count IV).

The Magistrate Judge recommended dismissing th privacy claim against the Sheriff's Department, but leaving it intact against Jiminez. Under Mass. Gen. Laws ch. 214, § 1B, a plaintiff must demonstrate unreasonable "public disclosure of private

information" in his complaint. Pendleton v. City of Haverhill, 156 F.3d 57, 64 (1st Cir. 1998). The disclosed facts must not be merely "information not generally known to the public," but instead must be facts of a "highly personal or intimate nature." French v. United Parcel Service, Inc., 2 F. Supp. 2d 128, 131 (D. Mass. 1998). See Pressman v. Brigham Medical Group Found. Inc., 919 F. Supp. 516, 524 (D. Mass. 1996) (medical reports); Wagner v. City of Holyoke, 241 F. Supp. 2d 78, 100 (D. Mass. 2003) (psychiatric report and doctor's note).

As with a defamation claim, an employer enjoys the privilege of limited circulation of private information for business purposes so long as there is a legitimate reason for doing so. See Bratt, 467 N.E.2d at 135-36. However, in evaluating the "reasonableness" of the disclosure "the employer's legitimate interest in determining the employee's effectiveness in their jobs should be balanced against the seriousness of the intrusion on the employee's privacy." Id. Ultimately, there is no reasonable expectation of privacy regarding facts that have already filtered into the public domain. See Pendleton, 156 F.3d at 64. See also Dasey v. Anderson, 304 F.3d 148, 154 (1st Cir. 2002)("[A]ctivity in the presence of others who owe no duty of confidentiality . . . is hardly 'private.'").

A review of the language of the suspension letter reveals that there has been no presentment of private facts in the suspension letter. The letter merely serves to document the reasons for Fuentes' termination and reiterates various facts and

opinions surrounding an incident for which he is receiving discipline. For this reason, the court will decline to adopt this portion of the Report and Recommendation, and will allow defendants' motion to dismiss Count IV in its entirety.

C. First Amendment/Fourteenth Amendment/§ 1983 Claims (Count V, Count VII, Count IX).

The Magistrate Judge recommended that all the plaintiffs' federal Constitutional claims proceed. The federal questions fall into two categories: (1) allegations that the defendants violated the plaintiffs' First Amendment free speech rights and (2) allegations that the defendants also violated Fourteenth Amendment due process rights of the plaintiff Fuentes.

Section 1983 protects from violation, under color of state law, all rights, privileges or immunities secured by the federal Constitution and laws. See generally, Maine v. Thiboutot, 448 U.S. 1 (1980). One of the crucial rights covered by § 1983 is a public employees' freedom from discipline for exercising his First Amendment right to free speech. See Pickering v. Bd. of Educ., 391 U.S. 563 (1968); Santos v. Miami Region, U.S. Customs Serv., 642 F.2d 21, 25 (1st Cir. 1981). Similarly, a public employee enjoys certain due process rights under the Fourteenth Amendment. See, e.g., Board of Regents v. Roth, 408 U.S. 564, 569-70 (1972).

1. First Amendment

It is unnecessary to replow ground already covered very well by Magistrate Judge Neiman. For the reasons set forth at pp. 12-16 of the Report and Recommendation, it is clear that, at this

stage of the litigation, the court simply cannot say as a matter of law that Fuentes' expression failed to implicate a matter of public concern, or that the relevant interests in play here balance against the plaintiff. Again, the defendants' arguments regarding these First Amendment claims may be resurrected upon a fuller record at the summary judgment stage.

2. Fourteenth Amendment

The defendants continue to contend that Fuentes's federal due process claim should be dismissed on jurisdictional or preemption principles because there was no administrative exhaustion pursuant to the "steps" of the CBA. Fuentes' due process claim is described as follows:

> Fuentes . . . was denied any administrative remedy when the Defendants refused to allow [his] attorney to present the matter on [Fuentes'] behalf at the [Step 3] grievance hearing, and instead abruptly ceased and concluded the hearing. [Fuentes] was denied the administrative right to representation, to subpoena a witness, to cross-examine witnesses, to confront his accuser, and to procedural protections. As a result, [Fuentes] did not submit the grievance to arbitration, and is left with the remaining option to ask for remedies by this Court.

Pls.' Mem. in Opp. (Doc. No. 7) at 15. The defendants argue that, because Fuentes failed to exhaust the administrative procedures outlined in the CBA and those under the corresponding state law, he cannot now allege a due process violation.

The Supreme Court has made clear that "exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983." Patsy v. Bd. of Regents, 457 U.S. 496, 516 (1982). Granted, Patsy may prove

irrelevant if the defendants can ultimately show that "the grievance procedures contained in the [CBA] provide[d] whatever process . . . [was] due as a matter of federal law." Narumanchi v. Bd. of Trustees, 850 F.2d 70, 72 (2d Cir. 1988). However, it is too early to decide at this nascent stage whether Step 3 or Step 4 of the CBA provided Fuentes all the process he was due, such as adequate notice and opportunity to be heard. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) (due process requires notice and opportunity to be heard). Fuentes should be allowed to pursue this claim through discovery.[3]

D. Whistleblower Act Claim (Count VIII).

The Magistrate Judge recommended dismissing the Whistleblower Act claim against Jiminez, but leaving it to proceed against the Sheriff's Department and Ashe. The defendants argue that the Whistleblower Act does not apply to a situation where, as here, the plaintiff does not allege that he suffered retaliation based on any protected disclosures. Moreover, the defendants contend that the notice requirements of the Whistleblower Act have not been satisfied.

The Whistleblower Act states that "[a]n employer shall not take any retaliatory action against an employee" who discloses or threatens to disclose certain information. Mass. Gen. Laws. ch.

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[3] As the Magistrate Judge noted, the due process claim must be dismissed if, after discovery, it materializes that there is no official policy or custom which caused Constitutional injury to Fuentes. See Monell v. Dep't of Social Servs., 436 U.S. 658, 690-91 (1978)(no due process claim against municipality or official without policy or custom).

149, § 185(b). Under Mass. Gen. Laws ch. 149, § 185, a public employee is protected from retaliatory action only when he engages in specific protected conduct and complies with the notice provisions of the statute. See Wagner v. City of Holyoke, 241 F. Supp. 2d 78, 97-99 (D. Mass. 2003). The type of conduct protected must involve "disclosing 'to a supervisor or to a public body' conduct which the employee 'reasonably believes' is a violation of law or poses a risk to the public." Id. at 97 (citing Mass. Gen. Laws ch. 149, § 185). The specific notice requirements of the statute require that the complainant "bring the 'activity, policy or practice in violation of a law . . . to the attention of a supervisor of the employee by written notice' and afford the employer 'a reasonable opportunity to correct the activity, policy or practice.'" Id.

Here, the conduct alleged by the plaintiff simply does not fall within the framework of the statute. While the exact parameters of conduct actionable under the Whistleblower Act remain for decision, see Larch v. Mansfield Mun. Elec. Dep't, 272 F.3d 63, 71 (1st Cir. 2001) (declining to address the issue of what types of actions by employers constitute "retaliatory action" as proscribed by statute), the plaintiff in this instance is clearly outside them. The complaint simply does not allege that Fuentes was retaliated against for either disclosing or threatening to disclose illegal policies or practices of the Sheriff's Department. Instead, it appears that Fuentes was disciplined for undertaking an allegedly malicious inquiry and

for insubordination based on his failure to disclose those rumors of sexual harassment to his supervisor as an initial matter.

In addition, Fuentes did not comply with the notice provisions of the Whistleblower Act. He revealed his concerns only upon direct questioning when he was subsequently disciplined by his supervisor for his allegedly insubordinate and disruptive inquiry. Because the complaint's allegations fail, both factually and procedurally, to fall under the umbrella of the Whistleblower Act, the court will decline to adopt the Report and Recommendation and will dismiss Count VIII in its entirety.

E. Civil Conspiracy Claim (Count X).

The Union has alleged that the Sheriff's Department has conspired to "abridge the plaintiff, IBCO, its agents, servants and employees from engaging in protected free speech, union activities . . . ". Complaint at ¶ 80. The defendant's only assertion with respect to the union's civil conspiracy claim was the jurisdictional argument, which the Magistrate Judge rejected, at least at this stage. Since the court agrees that the jurisdictional argument is without merit as to the conspiracy claim, Count X will be left for further proceedings.

V. CONCLUSION

For the reasons set forth above, the Report and Recommendation of the Magistrate Judge, upon de novo review, is hereby ADOPTED, except that Count IV (privacy) and Count VIII (Whistleblower Act) are dismissed in their entirety.

The defendants' motion to dismiss is hereby ALLOWED as to

all defendants on Counts I, II, IV, VI, VIII and XI. Count III is dismissed as to defendants Ashe and the Sheriff's Department only. To summarize, the following counts have survived: Count III (defendant Jiminez only), Count V, Count VII, Count IX and Count X.

The clerk will refer this case to Magistrate Judge Neiman for a pretrial scheduling conference.

It is So Ordered.

MICHAEL A. PONSOR
U. S. District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ORLANDO FUENTES and INTERNATIONAL BROTHERHOOD OF CORRECTIONAL OFFICERS, LOCAL NO. 248, Plaintiffs	)	
v.	)	Civil Action No. 02-30173-MAP
HAMPDEN COUNTY SHERIFF'S DEPARTMENT, MICHAEL ASHE, AS SHERIFF, and DIANE JIMENEZ, Defendants	)	

REPORT AND RECOMMENDATION REGARDING
DEFENDANTS' MOTION TO DISMISS (Docket No. 4)
June 30, 2003

NEIMAN, U.S.M.J.

On August 16, 2002, Orlando Fuentes ("Fuentes") -- an employee of the Hampden County Sheriff's Department ("Sheriff's Department") and a shop steward of the International Brotherhood of Correctional Officers, Local No. 248 ("the Union") -- received a letter suspending him for five days for an inquiry he made regarding a rumor that a captain had been engaging in sexual harassment. Fuentes and the union (together "Plaintiffs") now bring this multi-count civil rights action against the Sheriff's Department, Michael Ashe ("Ashe") in his official capacity as Sheriff, and Diane Jiminez ("Jiminez"), the Assistant Deputy Superintendent of Personnel and author of the suspension letter.

Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), the Sheriff's Department, Ashe and Jiminez (together "Defendants") have moved pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) to dismiss the complaint, arguing that the court lacks jurisdiction over the subject matter and that the complaint fails to state claims upon which relief may be granted. Defendants' motion to dismiss has been referred to this court for a report and recommendation. *See* 28 U.S.C. § 636(b)(1)(B). For the reasons indicated below, the court will recommend that Defendants' motion be allowed in part and denied in part.

I. STANDARDS OF REVIEW

Rule 12(b)(1) empowers a party to seek dismissal of an action for "lack of jurisdiction over the subject matter" and Rule 12(b)(6) allows a complaint to be dismissed for "fail[ing] to state a claim upon which relief can be granted." Both rules require the court to construe the complaint's allegations in favor of the plaintiff, the non-moving party. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Negron-Gaztambide v. Hernandez-Torres*, 35 F.3d 25, 27 (1st Cir. 1994).

II. BACKGROUND

The following background is taken either directly from the complaint or from "documents the authenticity of which are not disputed by the parties[,] . . . official public records[,] . . . documents central to [P]laintiffs' claim[s] . . . [or] documents sufficiently referred to in the complaint." *Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co.* 267 F.3d 30, 33 (1st Cir. 2001) (indicating that such documents may be considered on Rule 12(b)(6) motion without converting it into a motion for summary judgement). *See also Gonzalez v. United States*, 284 F.3d 281, 288 (1st Cir. 2002) (observing that court,

in determining whether to dismiss a complaint pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction, may consider materials outside the pleadings). The facts are stated in a light most favorable to Plaintiffs.

In late July of 2002, just after Fuentes punched in but prior to roll call, he "heard a rumor" from an unnamed employee "that a certain Primary Captain was engaging in sexual harassment." (Complaint ¶ 23.) According to the complaint:

> 24. . . . Fuentes[,] acting in his union capacity[,] asked several questions [to the employee] about the Primary Captain's management style in an attempt to determine whether there was any validity to the rumor[] . . . .
>
> 25. [Fuentes'] inquiry did not raise to the level of an investigation but was merely a frank discussion of a rumor[] and the validity of the rumor.
>
> 26. The discussions concerning the sexual harassment allegations all took place before the start of [Fuentes'] shift and did not prevent him from doing any of the duties he was required to do during his shift.
>
> 27. Satisfied that he had insufficient information to investigate the matter, or report the Primary Captain to management, [Fuentes] did not perform any investigation into the matter or examine the issues any further.

(*Id*. ¶¶ 24-27.)

Fuentes "inquiry" of the purported sexual harassment apparently did not sit well with Jiminez who, in a letter dated August 16, 2002, advised him that, because of his actions, he would be immediately suspended for five days without pay. (See Document No. 5 ("Defs.' Brief"), Exhibit ("Ex.") D at 1.) Among other things, Jiminez stated that the Sheriff's Department had "investigated the matter" and determined that the rumor of

sexual harassment was "both completely false and . . . readily ascertainable by simply speaking to the alleged victim." (*Id*.) Jiminez further alleged that Fuentes failed to adhere to the parties' collective bargaining agreement ("CBA"), which, in pertinent part, states that "employees who have any information about an incident or incidents of sexual harassment must report same in writing immediately." (*Id*. (emphasis omitted).) Fuentes was being suspended, Jiminez concluded, based on his "failure to follow the clear contract immediate reporting requirement, . . . lack of candor during the investigation, . . . conducting 'union' or personally motivated business on work time without permission and engaging in conduct under the guise of an investigation that was reckless and damaging to the reputation of a supervisor." (*Id*. at 1-2.)

Fuentes filed a grievance and a "Step 3" hearing, described more fully below, was scheduled for September 12, 2002. (Complaint ¶¶ 40, 42.) However, when the Sheriff's Department learned that Fuentes would not speak on his own behalf, but instead would have the Union present the grievance, Ashe cancelled the hearing. (See *id*. ¶ 45.)[4] Five days later, in a letter dated September 17, 2002, Ashe stated that, after

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[4] **The complaint alleges the following with respect to the Step 3 hearing which Ashe purportedly "canceled":**

> **47. By canceling the hearing, [Ashe] . . . denied . . . Fuentes his contractual rights as well as his rights to due process.**
>
> **48. . . . [T]he Step 3 grievance hearing was cancelled due to [Fuentes'] exercise of his free speech and union rights.**
>
> **49. To date, . . . Fuentes has never . . . confronted his accusers . . . [or] reviewed the investigation into the facts underlying his suspension.**

"carefully considering" the matter, he was "denying [the] grievance, as the action protested does not violate the contract." (Defs.' Brief, Ex. C.)

On October 4, 2002, the union filed a Charge of Prohibited Practice with the Massachusetts Labor Relations Commission ("MLRC"). (Defs.' Brief, Ex. A.) In it, the union alleged that the Sheriff's Department had engaged in a prohibited practice by "terminat[ing] the [Step 3] hearing rather than hav[ing] [Fuentes] present his . . . case through counsel." (*Id*.)

In the meantime, on October 1, 2002, Plaintiffs commenced the instant action in state court and Defendants thereafter removed the action to this forum. The complaint has eleven counts. The nine counts brought by Fuentes allege the following: that Jiminez intentionally inflicted emotional distress on him (Count I) and interfered with his contractual relations (Count II); that the Sheriff's Department violated Fuentes' First and Fourteenth Amendment rights (Count V) and breached his employment contract (Count XI); that Jiminez and the Sheriff's Department, together, defamed Fuentes (Count III) and violated his right to privacy (Count IV); and that all three defendants violated Fuentes' rights pursuant to the Massachusetts Civil Rights Act, Mass. Gen. L. ch. 12, § 11I ("MCRA") (Count VI), 42 U.S.C. § 1983 ("section 1983") (Count VII), and Mass. Gen. L. ch. 149, § 185 (hereinafter "the Whistleblower Act") (Count VIII). For its part, the Union alleges that the Sheriff's Department violated its First Amendment rights (Count IX) and is liable for engaging in a civil conspiracy (Count X). In due course, Defendants filed the instant motion to dismiss, Plaintiffs tendered an opposition and the court heard

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(Complaint ¶¶ 47-49.)

oral argument.

III. DISCUSSION

Before addressing the merits of Defendants' motion, the court notes that Plaintiffs, either in their papers or at oral argument, have conceded to the dismissal of all of Count I as well as those parts of Counts III and VI targeting Ashe and the Sheriff's Department. Accordingly, the court will recommend that Defendants' motion be allowed with respect to those claims. As to the remainder of the complaint, the court divides its discussion into three parts: (1) Defendants' jurisdictional argument; (2) Plaintiffs' federal questions; and (3) the complaint's state-law causes of action.

A. JURISDICTION

Defendants' jurisdictional argument is grounded primarily in the CBA. In essence, Defendants argue that the CBA precludes Plaintiffs from bringing suit unless and until their contractual remedies have been exhausted. After careful consideration, the court agrees with Defendants that it lacks jurisdiction over Fuentes' breach of contract and intentional interference with contractual relations claims, but that, at least for now, it should maintain jurisdiction over Plaintiffs' other causes of action.

There are several CBA provisions potentially applicable here. First, the CBA gives Ashe, as Sheriff, the right to suspend an employee "for just cause." (Defs.' Brief, Ex. B, Article ("Art.") 7, § 1.) Second, the CBA makes clear that the Sheriff's Department is precluded from "discriminat[ing] against any employee . . . for exercising any right under this Agreement or applicable state law." (*Id*., Art. 5, § 1(b).) Third, and most importantly for purposes of Defendants' jurisdictional argument, the CBA outlines a four-

step procedure for resolving "[a]ny grievance or dispute which may arise between the [p]arties." (*Id*., Art. 6.) Following an informal attempt to settle the dispute (Step 1) and submission of the grievance to the Assistant Superintendent (Step 2), the employee is permitted at Step 3 to bring his grievance to the Sheriff who "shall render a decision in writing on the grievance stating the basis for such decision within seven (7) working days from the date it was submitted to him." (*Id*.) Finally, at Step 4, the CBA states that, "[i]n the event the grievance remains unresolved, the Union . . . [may] submit the grievance to arbitration." (Defs.' Brief, Ex. B, Art. 6.)

In support of their jurisdictional argument, Defendants contend that when, as here, a collective bargaining agreement provides a procedure for resolving grievances, "the general rule" in Massachusetts "is that the remedies specified in the agreement must be exhausted before an employee may resort to the courts." *O'Brien v. New Eng. Tel. & Tel. Co.*, 664 N.E.2d 843, 849 (Mass. 1996). *See also Johnston v. Sch. Comm. of Watertown*, 533 N.E.2d1310, 1311 (Mass. 1989); *Balsavich v. Local Union 170 of Int'l Bhd. of Teamsters*, 356 N.E.2d 1217, 1220-21 (Mass. 1976). According to Defendants, Ashe "issued the Step 3 reply as required" but, thereafter, Plaintiffs "never filed for arbitration as provided for under [Step 4]." (Defs,' Brief at 5 (emphasis omitted).) Thus, Defendants conclude, the court lacks jurisdiction over each and every one of Plaintiffs' claims.

Plaintiffs, in response, do not dispute that they bypassed Step 4. Rather, relying on a line of federal cases, Plaintiffs argue that they can bring all of their claims to this

forum since they are all based on "civil rights" causes of action pursuant to section 1983. (See Document No. 7 ("Pls.' Brief") at 4-6 (citing *Heck v. Humphrey*, 512 U.S. 477 (1994); *Bassinger v. City of New Smyrna Beach, Fla.*, 50 F.3d 922 (11th Cir. 1995); *Britt v. Simi Valley Unified Sch. Dist.*, 696 F.2d 644 (9th Cir. 1982); *Acciavatti v. Prof. Servs. Group, Inc.*, 982 F. Supp. 69 (D. Mass. 1997); and *Bowman v. Twp. of Pennsauken*, 709 F. Supp. 1329 (D.N.J. 1989).) *See also Patsy v. Bd. of Regents*, 457 U.S. 496, 516 (1982) ("[E]xhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983.")

In this court's view, neither side is entirely accurate. Case law cited by the parties indicate that the threshold issue is not necessarily one of exhaustion, but, rather, whether certain state law claims ought to be "preempted" by federal law insofar as the claims "necessitate[] analysis of, or substantially depend[] on the meaning of, a collective bargaining agreement." *Cullen v. E.H. Friedrich Co.*, 910 F. Supp. 815, 820 (D. Mass. 1995) (citing *Quesnel v. Prudential Ins. Co.*, 66 F.3d 8, 10 (1st Cir.1995) (internal quotation marks omitted)). Here, the CBA states that "[a]ny grievance or dispute which may arise between the [p]arties" should be channeled through the CBA's four-step process. State law claims which are "inextricably intertwined" with the CBA may be jurisdictionally "preempted." *See, e.g.*, *Acciavatti*, 982 F. Supp. at 74 (quoting *Cullen*, 910 F. Supp. at 821 (in turn quoting *Allis-Chalmers v. Lueck*, 471 U.S. 202, 213 (1985))).

The court believes that Fuentes' breach of contract and intentional interference with contractual relations claims are "inextricably intertwined" with the CBA and,

therefore, ought to be dismissed as preempted. Indeed, the breach of contract claim specifically alleges that the Sheriff's Department "repudiated its contract and its rights to arbitration by breaching the contractual provisions contained in the [CBA]." (Complaint ¶ 84.) Similarly, the intentional interference with contractual relations claim asserts that Jiminez, by suspending Fuentes, "intentionally interfered with his employment relationship" which is purportedly outlined by the CBA. (*Id*. ¶ 54.) *See Acciavatti*, 982 F. Supp. at 76 (finding that intentional interference with contractual relations claim is preempted because it "requires reference to, and interpretation of, the CBA"). In short, it appears that the court lacks jurisdiction over Counts II and XI.

On the other hand, none of the cases Defendants cite support the dismissal, at least on preemption grounds, of Plaintiffs' remaining state law claims, namely, their defamation, right to privacy, MCRA, whistleblower and civil conspiracy causes of action. Rather, it appears from the court's own research that those claims, as well as Plaintiffs' First Amendment claims, do not involve an interpretation of the CBA. *See, e.g.*, *Acciavatti*, 982 F. Supp. at 77-79 (not discussing preemption with respect to defamation or MCRA causes of action); *Taverna*, 638 F. Supp. at 247-48 (discussing exhaustion in context of breach of CBA claim, but not with regard to civil rights violations); *Pierre v. Town of Dartmouth*, 1 Mass. L. Rptr. 20, 1993 WL 818748, at *2-3 (Mass. Super. Ct. July 6, 1993) (similar). *See also Williams v. Trimble*, 527 F. Supp. 910, 911-12 (S.D.N.Y. 1981) (failure to exhaust did not preclude First Amendment claim); *Bennett v. Mass. Bay Trans. P. Auth.*, 8 Mass. L. Rptr. 154, 1998 WL 52245, at *7-8 (Mass. Super. Ct. Feb. 2, 1998) (dismissing breach of contract and breach of CBA claims on

exhaustion grounds, but allowing defamation claim to survive).

Nonetheless, Defendants contend that Fuentes' federal due process claim in particular should be dismissed on jurisdictional, if not "preemption," grounds because it was not administratively exhausted. Fuentes' due process claim is described by Plaintiffs as follows:

> Fuentes . . . was denied any administrative remedy when . . . Defendants refused to allow [his] attorney to present the matter on [Fuentes'] behalf at the [Step 3] grievance hearing, and instead abruptly ceased and concluded the hearing. [Fuentes] was denied the administrative right to representation, to subpoena a witness, to cross-examine witnesses, to confront his accuser, and to procedural protections. As a result, [Fuentes] did not submit the grievance to arbitration, and is left with remaining option to ask for remedies by this Court.

(Pls.' Brief at 15.) Defendants argue that, because Fuentes failed to exhaust the administrative procedures outlined in the CBA and state law, he cannot now allege a due process violation.

In the court's estimation, Defendants' exhaustion argument with respect to Fuentes' due process claim is premature. The Supreme Court has made clear that "exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983." *Patsy*, 457 U.S. at 516. Granted, Defendants argue that "*Patsy* is irrelevant" whenever, as they claim is true here, "the grievance procedures contained in the [CBA] provide[] whatever process . . . [is] due as a matter of federal law." *Narumanchi v. Bd. of Trustees*, 850 F.2d 70, 72 (2nd Cir. 1988). The court still believes, however, that it is too early to tell whether Step 3 of the CBA provided

Fuentes all the process he was due, i.e., adequate notice and opportunity to be heard. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985). As Plaintiffs alleged at oral argument, the past practice of the Sheriff's Department was to allow grievants to speak and have counsel present at Step 3 hearings. Allegedly, Fuentes was not given such accommodations. At the very least, the court believes, Fuentes should be allowed to pursue this claim through discovery.

Before moving on, the court adds one final jurisdictional note. Defendants appear to argue that a portion of a Massachusetts statute governing public employees strips the court of subject matter jurisdiction. The statutory provision cited states that parties to a collective bargaining agreement "may include [in their agreement] a grievance procedure culminating in final and binding arbitration . . . provided that binding arbitration . . . shall, where such arbitration is elected by the employee as the method of grievance resolution, be *the exclusive procedure for resolving any . . . grievance involving suspension*, dismissal, removal or termination . . . ." Mass. Gen. L. ch. 150E, § 8 (emphasis added by Defendants). Defendants argue that, since parts of this case revolve around a "grievance involving suspension," binding arbitration is the Union's, if not Fuentes', "exclusive procedure." (See Defs.' Brief, Ex. B, Art. VI, Step 4.) It appears to the court, however, that neither the Union nor Fuentes, for that matter, ever "elected" to proceed down the arbitration path. And, as described, the CBA itself may be found to violate due process. Accordingly, the court will not recommend dismissal of the complaint on the basis of Mass. Gen. L. ch. 150E, § 8.

B. FEDERAL QUESTIONS

The complaint's federal questions fall into two categories: (1) Plaintiffs' allegations that Defendants violated their free speech rights as guaranteed by the First Amendment (see Counts V, VII and IX); and (2) Fuentes' claim that Defendants violated his Fourteenth Amendment due process rights (see Counts V and VII). In evaluating Defendants' Rule 12(b)(6) arguments, the court will consider each category in turn. In so doing, the court is mindful that the claims at issue are brought pursuant to section 1983 which protects from violation, under color of state law, all rights, privileges or immunities secured by the federal Constitution and laws. *See generally Maine v. Thiboutot*, 448 U.S. 1 (1980).

1. First Amendment.

Fuentes' First Amendment claim spans both Counts V and VII which Plaintiffs acknowledged at oral argument should be considered one unit. The Union's First Amendment claim is found in Count IX.

a. *Fuentes*

One of the crucial rights covered by section 1983 is a public employee's liberty from discipline for exercising his First Amendment right to free speech. *See Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Santos v. Miami Region, U.S. Customs Serv.*, 642 F.2d 21, 25 (1st Cir. 1981) . Following *Pickering* and other Supreme Court precedent, the First Circuit employs a three part test to determine whether a public employee has an actionable First Amendment free speech claim pursuant to section 1983:

> *First*, the court must determine whether [the plaintiff] made [his] statements as a citizen upon matters of public concern. If the speech involved matters not of public concern, but

> instead of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. *Second*, the court must weigh the strength of the employee's and the public's First Amendment interests against the government's interest in the efficient performance of the workplace. *Third*, if the employee's and the public's First Amendment interests outweigh a legitimate governmental interest in curbing the employee's speech, [the plaintiff] must show that the protected expression was a substantial or motivating factor in an adverse employment action.

Tang v. Rhode Is. Dep't of Elderly Affairs, 163 F.3d 7, 12 (1st Cir. 1998) (emphasis added; citations an internal quotation marks omitted). Here, Defendants raise questions with regard to the first two factors only, both of which may be answered by the court as a matter of law. *See Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983).

With respect to the first factor -- whether Fuentes' speech involved a matter of "public concern" -- it is clear that "[g]arden variety employment beefs do not, in general, qualify for constitutional protection." *Wagner v. City of Holyoke*, 241 F. Supp. 2d 78, 90 (D. Mass. 2003) (citations omitted). As both the Supreme Court and the First Circuit have explained, the First Amendment's free speech clause "'does not require a public office to be run as a roundtable for employee complaints over internal office affairs.'" *Tang*, 163 F.3d at 12 (quoting *Connick*, 461 U.S. at 149). Still, for several reasons the court concludes that Fuentes' speech touched upon matters of public concern, at least for purposes of the present motion to dismiss.

First, it appears that union activities, unless purely personal, often constitute matters of public concern. *See, e.g.*, *Smith v. Arkansas State Highway Employees,*

Local 1315, 441 U.S. 463, 465 (1979) (the First Amendment protects the rights of public employees to join together as a union); *Gregorich v. Lund*, 54 F.3d 410, 415 (7th Cir. 1995) (effort to unionize employees went beyond self interest and was matter of public concern); *Boddie v. City of Columbus*, 989 F.2d 745, 750 (5th Cir.1993) ("much more of the range of [union] activity than the range of employee speech . . . is inevitably of public concern"); *Monks v. Marlinga*, 923 F.2d 423, 424 (6th Cir. 1991) (union activities deemed matter of public concern, particularly at motion to dismiss stage). Here, of course, Fuentes' inquiry, for which he was disciplined, was ostensibly conducted "in his union capacity." (Complaint ¶ 24.) *Compare Meaney v. Dever*, 326 F.3d 283, 289 (1st Cir. 2003) (blowing horn in order to irritate mayor after union picketing had concluded was a personal expression and, thus, not a matter of public concern).

Second, it is significant that Fuentes' inquiry involved alleged sexual harassment. Granted, the court does not believe, as Plaintiffs appear to argue, that *any* discussion of sexual harassment rumors by a public employee would be entitled to constitutional protection, particularly if the rumors turn out to be false. *See Rankin v. McPherson*, 483 U.S. 378, 384-85 (1987) ("Whether employee speech addresses a matter of public concern must be determined by the content, form, and context of a given statement."). However, there appears to be ample (albeit not universal) support in the case law to conclude, at least for purposes of the present motion to dismiss, that Fuentes' inquiry, as a union official, about allegations of sexual harassment by a Primary Captain may

legitimately constitute a matter of public concern. *See, e.g.*, *Hall v. Missouri Highway &*

Transp. Comm'n, 235 F.3d 1065, 1067-68 (8th Cir. 2000) (employee's complaint of an overall pattern of discrimination against women related to a matter of public concern); *Marshall v. Allen*, 984 F.2d 787, 796 (7th Cir. 1993) (plaintiff's defending employees who had accused supervisor of sexual harassment constituted a matter of public concern); *Gray v. Lacke*, 885 F.2d 399, 411 (7th Cir. 1989) (employee's complaints about sexual harassment on the job were matters of public concern and, in fact, "sexual harassment may inherently be a matter of public concern"). *See also Bonnell v. Lorenzo*, 241 F.3d 800, 812-13 (6th Cir. 2001) (professor's circulation of student's sexual harassment complaint with name of student redacted in order to attack school's sexual harassment policy was a matter of public concern). *Cf. Connick*, 461 U.S. at 147 n.8 (stating, in dicta, that a public employee's "right to protest racial discrimination" is "a matter inherently of public concern"); *Bennett v. City of Holyoke*, 230 F. Supp. 2d 207, 224 (D. Mass. 2002) (observing that "statements made by [city police officer] regarding corruption and racism within the . . . police department were on matters of public concern.") (emphasis in original). *But see Lautermilch v. Findlay City Schools*, 314 F.3d 271, 276 (6th Cir. 2003) (sexually explicit comment by teacher not a matter of public concern); *Kokkinis v. Ivkovich*, 185 F.3d 840, 844 (7th Cir. 1999) (discussion of sexual discrimination for personal reasons is not a matter of public concern); *Callaway v. Hafeman*, 832 F.2d 414, 417 (7th Cir. 1987) (complaint about individual sexual harassment not a matter of public concern).

With regard to the second factor -- the relative strength of Fuentes' First

Amendment interests compared to Defendants' interest in the efficient performance of the workplace -- Defendants argue that their "interest in following the CBA, maintaining staff respect and discipline, and limiting unauthorized investigations clearly outweighs [Fuentes'] right to conduct 'frank discussions' about a Primary Captain's management style or alleged sexually harassing behavior." (Defs.' Brief at 14.) The court, however, believes it is too early in the litigation to make such a sweeping declaration. As Defendants are no doubt aware, the court must construe Plaintiffs' civil rights allegations under the federal rules' liberal notice pleading standards. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993). Particularly at the early stages of litigation, an employee's interests in speaking freely about matters of public concern must be afforded great consideration. *See O'Connor v. Steeves,* 994 F.2d 905, 915-17 (1st Cir. 1993) (denying the defendant summary judgment on *Pickering* balancing test, even though the employee's speech was based on "self interest" and was "less than altruistic," insofar as the facts must be viewed in light most favorable to the plaintiff); *Pandolfi de Rinaldis v. Llavona*, 62 F. Supp. 2d 426, (D.P.R. 1999) (even though "[t]he Court must . . . afford the [defendant] an opportunity to present evidence at trial pertaining to any particular interest [it] may have had . . . that may outweigh [the plaintiff]'s expressions," the plaintiff's First Amendment claim survives the defendant's Rule 12(b)(6) motion).

In summary, the court believes that Fuentes' free speech interests appear strong and, therefore, his First Amendment causes of action ought not be dismissed for failing to state claims upon which relief may be granted. Accordingly, the court will recommend

that Defendants' motion to dismiss Fuentes' First Amendment claims be denied.

b. *The Union*

Defendants do not separately argue that Count IX, the Union's First Amendment claim for "equitable relief," should be dismissed pursuant to Rule 12(b)(6). Therefore, the court will recommend that Count IX also survive Defendants' motion to dismiss.

2. Due Process

The court has already addressed Fuentes' federal due process claim. To repeat, the court believes that Plaintiffs have made a colorable claim that, as applied, Step 3 itself violated Fuentes' due process rights. To be sure, as Defendants argue, Ashe and the Sheriff's Department ought to be dismissed from the due process claim should it turn out that there is no official "policy or custom" which caused Fuentes' constitutional injuries. *See Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978). In the court's estimation, however, it is too early to make that determination as a matter of law.

C. STATE LAW QUESTIONS

Defendants also argue that each of the complaint's remaining state law causes of action fails to present claims upon which relief may be granted. After carefully considering Defendants' arguments, the court, in the end, believes that the following state law claims ought to be dismissed pursuant to Rule 12(b)(6): Count IV (Fuentes' privacy claim), but only insofar as it targets the Sheriff's Department; Count VI (Fuentes' MCRA claim); and Count XI (Fuentes' breach of contract claim). As indicated above, Plaintiffs have conceded to the dismissal of Count I and of Counts III and VI insofar as they target Ashe and the Sheriff's Department and the court believes that Counts II and

XI ought to be dismissed on jurisdictional grounds.

1. Intentional Interference with Contractual Relations (Count II)

Fuentes alleges in Count II that Jiminez intentionally interfered with his contractual relations. Assuming it survives Defendants' jurisdictional argument, see discussion *supra*, the court believes Count II should not be dismissed for failing to state a claim upon which relief may be granted.

To prevail on his claim, Fuentes must prove that "(1) he had a contract (or business relationship for economic benefit) with a third party; (2) [Jiminez] knowingly and intentionally interfered with that contract or relationship; (3) [her] interference was improper in motive or in means; and (4) [he] was actually harmed by [her] actions." *Netherwood v. Am. Fed'n of State, County and Mun. Employees, Local 1725*, 757 N.E.2d 257, 266 (Mass. App. Ct. 2001) (citing *Harrison v. NetCentric Corp.*, 744 N.E.2d 622 (Mass. 2001)), *rev. denied*, 762 N.E.2d 324 (Mass. 2002). Where, as here, the defendant is an individual official of the employer, "[Fuentes] is required to show, as to improper motive or means, that the controlling factor in the alleged interference was actual malice." *Weber v. Community Teamwork, Inc.*, 752 N.E.2d 700, 715 (Mass. 2001) (citations and internal quotation marks omitted). Although it may be difficult for Fuentes to ultimately prove that Jiminez was motivated by "actual malice," the tenor of the suspension letter along with the disputed circumstances surrounding its distribution are sufficient, in this courts' view, for Count II to survive Plaintiffs' relatively modest Rule 12(b)(6) hurdle.

2. Defamation (Count III)

In Count III, Fuentes argues that, by "publishing" the suspension letter, Jiminez defamed him. In Massachusetts, defamation has been defined as "the intentional or reckless publication, without privilege to do so, of a false statement of fact which causes damage to the plaintiff's reputation." *Elicer v. Toys "R" Us, Inc.*, 130 F. Supp. 2d 307, 310 (D. Mass. 2001) (citing *Correllas v. Viveiros*, 572 N.E.2d 7,10 (Mass. 1991)). Typically, the statement must "discredit the plaintiff in the minds of any considerable and respectable segment in the community." *Draghetti v. Chimelewski*, 626 N.E.2d 862, 866 (Mass. 1994) (citations and internal quotation marks omitted).

In the case at bar, Defendants first argue that the suspension letter was not "published" to a "considerable and respectable segment of the community." For purposes of the present motion, the court disagrees. "There is no requirement in an action of libel 'that the defamatory matter be communicated to a large or even substantial group of persons. It is enough that it is communicated to a single individual other than the one defamed." *Brauer v. Globe Newspaper Co.*, 217 N.E.2d 736, 739 (Mass. 1966) (quoting Restatement: Torts § 577; further citations omitted). Here, copies of Jiminez's letter were distributed to Ashe, three assistant superintendents, the Sheriff's Department, outside legal counsel and the Union. (See Defs.' Brief, Ex. D.) This is sufficient publication, in this court's view, to survive Defendants' first argument.

The court also believes that Fuentes' claim survives Defendants' second argument -- that Jiminez had a "conditional privilege" to disclose defamatory information concerning Fuentes because her letter was "reasonably necessary to serve the [Sheriff's Department]'s legitimate interest in the fitness of [Fuentes] to perform his . . .

job." *Foley v. Polaroid Corp.*, 508 N.E.2d 72, 79 (Mass. 1987) (citation and internal quotation marks omitted). For purposes here, the court will assume that Jiminez, in fact, had a conditional privilege. Defendants, however, acknowledge that such a privilege would be lost if she acted recklessly in publishing the information. *See Bratt v. Int'l Bus. Mach. Corp.*, 467 N.E.2d 126, 132-33 (Mass. 1984). In the court's view, it is possible, but not inevitable, that Jiminez's actions were reckless. For example, as Plaintiffs point out, the letter did more than state facts; it added Jiminez's commentary that Fuentes acted with "gross and inconceivable disregard," that his actions constituted "personally motivated business [conducted] on work time" and that his conduct was taken "under the guise of an investigation that was reckless and damaging to the reputation of a supervisor." (Defs.' Brief, Ex. D.) In short, the court will recommend that Defendants' motion be denied with respect to Count III. *See Disend v. Meadowbrook Sch.*, 604 N.E.2d 54, 56 (Mass. App. Ct. 1992) (holding that letter regarding employee discipline could be considered defamatory since "[t]he import of the letter implied the existence of other undisclosed facts which . . . were discrediting and, hence, potentially defamatory").

3. Violation of Right to Privacy (Count IV)

Count IV alleges that Jiminez's publication of the letter violated Fuentes' right to privacy. It is clear from the parties' memoranda that Count IV is brought pursuant to Mass. Gen. L. ch. 214, § 1B, which states that "[a] person shall have a right against unreasonable, substantial or serious interference with his privacy." (See Defs.' Brief at 10 and Pls.' Brief at 10-11 (both citing *Bratt*, *supra*, which, in turn, construes Mass. Gen. L. ch. 214, § 1B).) It is also clear that Count IV targets both the Sheriff's Department

and Jiminez.

a. *The Sheriff's Department*

Unlike with Counts III and VI, Plaintiffs have not conceded to the dismissal of Count IV insofar as it targets the Sheriff's Department. Nonetheless, the court believes that the Sheriff's Department ought to be dismissed from that count. Even though the Massachusetts Tort Claims Act ("MTCA") makes public employers such as the Sheriff's Department "liable for injury . . . caused by the negligent or wrongful act or omission of [a] public employee" such as Jiminez, Mass. Gen. L. ch. 258, § 2, it does not apply to "any claims arising out of an intentional tort, including . . . invasion of privacy" claims, *id.*, § 10(c). In other words, "[u]nder the MTCA . . . public employers are not liable for intentional torts committed by public employees." *Armstrong v. Lamy*, 938 F. Supp. 1018, 1043 (D. Mass. 1996) (citing *Spring v. Geriatric Authority of Holyoke*, 475 N.E.2d 727, 734 (Mass. 1985)).

b. *Jiminez*

With respect to Jiminez, Defendants argue that her "legitimate business interest" in publishing the suspension letter outweighs Fuentes' right to privacy concerning the suspension and was not "unreasonable" under the circumstances. *See Bratt*, 467 N.E.2d at 134-35. In the court's view, however, it is too early to resolve these questions of legitimacy and reasonableness. *See Gauthier v. Police Comm'r of Boston*, 557 N.E.2d 1374, 1376 (Mass. 1990) (determining issues of legitimacy and reasonableness on a developed record at summary judgment). Accordingly, the court will recommend that the Sheriff's Department, but not Jiminez, be dismissed from Count IV.

4. MCRA (Count VI)

To establish an MCRA claim, Plaintiffs must prove that Fuentes' exercise or enjoyment of rights secured by the constitution or laws of either the United States or Massachusetts has been interfered with, or attempted to be interfered with, by threats, intimidation or coercion. *See* Mass. Gen. L. ch. 12, §§ 11H and 11I.[5] While the MCRA is the state "counterpart" to section 1983 and is basically "coextensive with" the federal statute, there are some differences. For example, to succeed on an MCRA claim, a plaintiff, unlike with section 1983, must show that the derogation of rights occurred "by threats, intimidation or coercion." *Bally v. Northeastern Univ.*, 532 N.E.2d 49, 52 (Mass. 1989). Here, Defendants argue, Plaintiffs have not sufficiently alleged "threats,

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[5] **In pertinent part, sections 11H and 11I state as follows:**

> **[11H:] Whenever any person or persons, whether or not acting under color of law, interfere by threats, intimidation, or coercion, with the exercise and enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, the attorney general may bring a civil action for injunctive or other appropriate equitable relief in order to protect the peaceable exercise or enjoyment of the right or rights secured.**
>
> **. . . .**
>
> **[11I:] Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to interfere with, as described in section 11H, may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief as provided for in said section, including the award of compensatory money damages.**

intimidation, or coercion" by Jiminez.[6]

In order for "threats, intimidation, or coercion" to be found, the Supreme Judicial Court normally requires "a showing of an 'actual or potential physical confrontation accompanied by a threat of harm.'" *Carvalho v. Town of Westport*, 140 F. Supp. 2d 95, 101 (D. Mass. 2001) (quoting *Planned Parenthood League of Mass., Inc. v. Blake*, 631 N.E.2d 985, 989 n.8 (Mass. 1994)). As no actual or potential physical confrontation has been alleged here, Defendants assert, dismissal of the MCRA claim against Jiminez is warranted. Shortly after oral argument in the case at bar, however, the Massachusetts Supreme Judicial Court reaffirmed that "coercion" under the MCRA is "not limited . . . to actual or attempted physical force." *Buster v. George W. Moore, Inc.*, 783 N.E.2d 399, 410 (Mass. 2003). Rather, "in certain circumstances, economic coercion standing alone may be actionable under the act." *Id*. at 411. *See also ibid*. at 410 ("For example, we have suggested that coercion may be found where one part deprives another of rights due under a contract.").

Plaintiffs have not advanced an economic coercion theory, let alone any argument that non-economic "threats, intimidation, or coercion" are at issue. The court,

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[6] **As indicated, Plaintiffs have conceded to the dismissed of the Sheriff's Department and Ashe defendants from Count VI. This is proper. Unlike section 1983, it is clear that under Massachusetts law neither the Commonwealth nor any of its political subdivisions can be sued under the MCRA. *See Howcroft v. City of Peabody*, 747 N.E.2d 729, 744 (Mass. App. Ct. 2001). *See also LeBeau v. Town of Spencer*, 167 F. Supp. 2d 449, 455 (D. Mass. 2001); *Metivier v. Town of Grafton*, 148 F. Supp. 2d 98, 102 (D. Mass. 2001), *aff'd*, 283 F.3d 351 (1st Cir. 2002).**

therefore, need not guess at Fuentes' underlying claim. *See United States v. Ramirez-Rivera*, 241 F.3d 37, 40 (1st Cir. 2001) ("Judges are not expected to be mindreaders. Consequently, a litigant has an obligation to spell out his arguments squarely and distinctly, or else forever hold his peace.") (citations and internal quotation marks omitted). Indeed, Count VI itself states only that the alleged violation of Fuentes' federal constitutional rights constitutes a violation of the MCRA. This failure to even plead the necessary element of "threats, intimidation or coercion" makes the MCRA claim legally deficient. *See Buster*, 783 N.E.2d at 409 (Legislature, by explicitly limiting the MCRA to situations where there are "threats, intimidation or coercion . . . intended that even a direct deprivation of a plaintiff's secured rights would not be actionable under the act unless it were accomplished by means of one of these three constraining elements.") (citations and internal quotation marks omitted). Accordingly, the court will recommend that Jiminez, like Ashe and the Sheriff's Department be dismissed from Count VI.

5. Whistleblower Act (Count VIII)

Defendants' argument with respect to Fuentes' Whistleblower Act claim (Count VIII) is two-fold. First, Defendants contend that, for her part, Jiminez cannot be targeted by this claim because she is not Fuentes' "employer." *See* Mass. Gen. L. ch. 149, § 189(b) (stating that "[a]n *employer* shall not take any retaliatory action against an employee" who discloses or threatens to disclose certain information) (emphasis). The court agrees. The Whistleblower Act defines "employer" as "the commonwealth, and its agencies or political subdivisions, including, but not limited to cities, towns, counties and regional school districts, or any authority, commission, board or instrumentality thereof."

Mass. Gen. L. ch. 149, § 185(a)(2). Plaintiffs have provided no authority for the proposition that Jiminez was Fuentes' "employer" as so defined.

Second, as to Ashe and the Sheriff's Department, Defendants assert that the Whistleblower Act claim does not apply to a situation as is alleged here, where an employee is allegedly retaliated against for *failing* to disclose certain information. Plaintiffs disagree. They argue that *Larch v. Mansfield Mun. Elec. Dep't*, 272 F.3d 63 (1st Cir. 2001), supports Fuentes' right to make a claim under the Whistleblower Act which is grounded in his "not reporting" his sexual harassment inquiry. (Pls.' Brief at 18.) In *Larch*, the plaintiff successfully sued his employer under the Whistleblower Act for failing to hire his supervisor's friend. *See id.*, 272 F.3d at 70. While that situation is somewhat different than the facts here, the court is reluctant to conclude, at this early stage of the case, that Fuentes cannot cobble together a legally sustainable Whistleblower Act claim against the Sheriff's Department or Ashe. In fact, in recent months, the Whistleblower Act has received increased scrutiny in many ways not addressed by the parties' memoranda. *See, e.g.*, *Dirrane v. Brookline Police Dep't*, 315 F.3d 65 (1st Cir.2002); *Wagner*, 241 F. Supp. 2d at 97-99. In short, the court will recommend that Count VIII, insofar as it targets the Sheriff's Department and Ashe, survive Defendants' motion to dismiss.[7]

6. Civil Conspiracy (Count X)

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[7] **As a result, the court does not address Defendants' request for attorney's fees and costs pursuant to Mass. Gen. L. ch. 149, § 185(e)(1), for having to defend a Whistleblower Act claim which "was without basis in law or in fact."**

Defendants only assertion with respect to the union's civil conspiracy claim (Count X) is the jurisdictional argument which this court has suggested be rejected. Accordingly, the court will recommend that Count X survive Defendants' motion to dismiss.

7. Breach of Contract (Count XI)

As indicated, the court believes that it lacks jurisdiction over Count XI, Fuentes' breach of contract cause of action. Should that recommendation not be adopted, Defendants argue, alternatively, that Fuentes is not a party to the CBA and, therefore, lacks standing to bring a breach of contract claim. Plaintiffs have not responded to this argument. Accordingly, the court will recommend that Count XI be dismissed on these grounds as well.

IV. CONCLUSION

For the reasons stated, the court recommends that Defendants' motion to dismiss be ALLOWED with regard to the following causes of action: Counts I, II, VI and XI; Counts III and IV, but only insofar as they target the Sheriff's Department; and Count VIII, but only insofar as it targets Jiminez. In all other respects, the court recommends that Defendants' motion to dismiss be DENIED. In other words, should this report and recommendation be adopted *in toto*, only the following claims will survive: Counts III and IV insofar as they target Jiminez; Count VIII insofar as it targets the Sheriff's Department and Ashe; and Counts V, VII, IX and X.[8]

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[8] **The parties are advised that under the provisions of Rule 3(b) of the Rules for United States Magistrates in the United States District Court for the District of Massachusetts, any party**

DATED: June 30, 2003

/s/ Kenneth P. Neiman
KENNETH P. NEIMAN
U.S. Magistrate Judge

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who objects to these findings and recommendations must file a written objection with the Clerk of this Court within ten (10) days of the party's receipt of this Report and Recommendation. The written objection must specifically identify the portion of the proposed findings or recommendations to which objection is made and the basis for such objection. The parties are further advised that failure to comply with this rule shall preclude further appellate review by the Court of Appeals of the District Court order entered pursuant to this Report and Recommendation. *See Keating v. Secretary of Health & Human Services*, 848 F.2d 271, 275 (1st Cir. 1988); *United States v. Valencia-Copete*, 792 F.2d 4, 6 (1st Cir. 1986); *Scott v. Schweiker*, 702 F.2d 13, 14 (1st Cir. 1983); *United States v. Vega*, 678 F.2d 376, 378-379 (1st Cir. 1982); *Park Motor Mart, Inc. v. Ford Motor Co.*, 616 F.2d 603, 604 (1st Cir. 1980). *See also Thomas v. Arn*, 474 U.S. 140, 154-55 (1985). A party may respond to another party's objections within ten (10) days after being served with a copy thereof.